

Judicial Majoritarianism

Matthew E.K. Hall
Department of Political Science
University of Notre Dame
217 O'Shaughnessy Hall
Notre Dame, IN 46556
matt.hall@nd.edu

Joseph Daniel Ura
Department of Political Science
Texas A&M University
4348 TAMU
College Station, TX 77845
jura@tamu.edu

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Abstract

For decades, constitutional theorists have confronted the normative problems associated with judicial review by an unelected judiciary; yet, some political scientists contend that judicial review actually tends to promote majoritarian interests. We evaluate the majoritarian nature of judicial review and test the political foundations that shape this process. To do so, we construct a statute-centered data set of every important federal law enacted from 1949 through 2008 and estimate the probability of a law being challenged and subsequently invalidated by the Supreme Court. Our methodological approach overcomes problems of selection bias and facilitates a test of judicial majoritarianism and the mechanisms that drive that behavior. We find that the Court tends to invalidate laws with little support from elected officials, and this pattern is primarily driven by the justices' concern for congressional constraint during the certiorari stage.

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The tension between democratic values and judicial review is perhaps the most important problem in contemporary constitutional theory. The resulting friction is most famously articulated by Alexander Bickel: “The root difficulty is that judicial review is a counter-majoritarian force in our system”; consequently, judicial review is said to suffer from a “countermajoritarian difficulty” that makes it a “deviant institution in the American democracy” (1986, 16-18). This normative dilemma has served as a focal point for American constitutional theory for the last half-century (Friedman 2002).¹

Despite prominent and persistent attention to Bickel’s difficulty, many scholars challenge his premise that judicial review necessarily “thwarts the will of representatives of the actual people of the here and now” (1986, 17; see Friedman 2009). Instead, these scholars argue that the U.S. Supreme Court’s use of judicial review—including the invalidation of federal laws—tends to promote majoritarian interests, especially the interests of legislative majorities. For example, Robert Dahl suggests the Court is best understood as “an essential part... of the dominant [governing] alliance” rather than an oppositional or countermajoritarian institution (1957, 293). Following this line of thinking, scholars have argued that judicial review may legitimize majoritarian policies (Dahl 1957; Ura 2014), preserve legislative bargains (Landes and Posner 1975), remove legislative obstacles to political change (Whittington 2005), promote partisan goals (Clayton and Pickerill 2006; Gillman 2002), facilitate policy implementation (Rogers 2001), and help legislators avoid taking unpopular positions (Fox and Stephenson 2011; Graber 1993).

These competing views offer distinct predictions about interactions between the Supreme Court and Congress. If judicial review is a countermajoritarian institution, the invalidation of federal laws should be unrelated to congressional preferences. If, however, the Court tends to promote majoritarian interests as part of the “dominant alliance,” the invalidation of laws with majority support should be relatively rare. The tension between these views poses a critical theoretical puzzle with important implications for the study of judicial behavior, the separation of powers, and constitutional law. A countermajoritarian Court might be expected to reliably protect political

¹The “difficulty” has also attracted growing international attention (Hirschl 2002).

minorities—who are often also racial, ethnic, religious, or sexual minorities—against policies that might violate their rights. In contrast, a majoritarian judiciary might only protect minority rights as an incidental byproduct of convergence between majority and minority interests (Bell 1979) or a majority’s interests in preserving the institution of judicial review for its own purposes (Rogers and Ura 2011; Whittington 2007).

Our goal is to adjudicate between these theoretical claims in order to better understand the nature of judicial review. To do so, we consider three questions: (1) Is the Supreme Court’s exercise of judicial review best characterized as majoritarian or countermajoritarian? If judicial review is typically majoritarian, (2) when in the Court’s decision making process does this pattern emerge, and (3) which political and institutional mechanisms drive judicial majoritarianism?

To answer these questions, we construct a data set of every important federal statute enacted from 1949 to 2008 and test the relationship between lawmakers’ preferences and judicial review of those statutes in a duration framework. Next, we estimate a Heckman two-stage grouped duration model of the Court’s decisions to, first, hear challenges to important laws and, subsequently, invalidate all or part of the laws they consider. Finally, we evaluate two mechanisms that may drive judicial majoritarianism: (1) shared preferences between justices and lawmakers and (2) the justices’ concern for ideological constraint. Our approach combines two recent methodological innovations in the study of judicial review: centering analysis on statutes rather than cases (Harvey and Friedman 2006, 2009) and estimating current support for statutes based on roll call votes (Segal, Westerland and Lindquist 2011). The former mitigates problems of selection bias that may confound inferences based only on cases the Court has agreed to hear. The latter elucidates the relationship between lawmakers’ preferences and judicial decisions regarding specific public laws. Together, these approaches provide a powerful analytic framework for addressing a critical puzzle in the study of judicial behavior and American constitutional law.

Our results indicate, first, that the U.S. Supreme Court’s review of important public laws tends to promote majoritarian interests. The Court is less likely to invalidate important statutes that enjoy greater support among current lawmakers. Second, the data show that this majoritarian pattern is

the product of the Court's decisions at the agenda setting stage; the Court rarely invalidates important laws with strong majority support because the justices rarely hear challenges to such laws. Finally, contrary to common views in the literature, judicial majoritarianism does not appear to be the result of shared preferences between justices and lawmakers with regard to specific public policies. Instead, this pattern appears to be driven by the justices' concern for ideological constraint. The Court tends to avoid challenging congressional majorities when it is ideologically distant from the sitting Congress and, therefore, may more broadly fear sanctions or nonimplementation.

Together, these findings provide important evidence for a continued reevaluation of the role of judicial power in American politics. The Supreme Court is, in practice, a majoritarian institution. The Court rarely hears challenges to laws with congressional support and, in doing so, implicitly upholds those laws without hearing the complaints of injured parties. By side-stepping confrontations with Congress, the Court acts more like a part of the "dominant [governing] alliance" than a "counter-majoritarian force in our system." Moreover, the normative "difficulties" created by judicial review are more apt to follow from the Court's tendency to defer to Congress than the possibility of thwarting the people's representatives.

Judicial Countermajoritarianism?

A half-century ago, Alexander Bickel framed one of the central problems in modern constitutional theory. Accordingly to Bickel, "coherent, stable—and *morally supportable*—government is possible only on the basis of consent" (1986, 20; emphasis in original); yet, "when the Supreme Court declares unconstitutional a legislative act. . . it thwarts the will of representatives of the actual people of the here and now" (17). Thus, "[i]t is difficult to escape the conclusion that judicial review is moderately countermajoritarian, and to that extent, in tension with the principle of majority rule" (Klarman 1997, 495). Since then, constitutional scholars have been preoccupied—some say obsessed (Friedman 2002; Keck 2007, 513)—with resolving the apparent tension between judicial review and representative democracy. Yet, a growing body of research casts doubt on this assumption. Even before Bickel posed his normative dilemma, Robert Dahl found that the Court rarely invalidated federal laws, and those it did were outdated or unimportant (1957). Instead, the Court

generally “supports the major policies of the [dominant national] alliance” (293).

Other scholars have gone “beyond Dahl’s classic discussion. . . by pointing out that the judiciary can serve the regime’s interest” (Gillman 2004, 377-378). This literature suggests “the justices almost never engage in policy-making that challenges those power-holders who are in a position to assault their nominal independence” (Gillman 2003, 251). In fact, “[r]ather than a check on majority power, the federal courts often function as arenas for extending, legitimizing, harmonizing, or protecting the policy agenda of political elites or groups within the dominant governing coalition” (Clayton and Pickerill 2006, 1,391; see Whittington 2005, 582). A long series of studies suggests that elected officials have used courts to promote their interests in several policy domains, such as civil rights (Frymer 2003; McMahon 2004), criminal justice (Clayton and Pickerill 2006), federalism (Clayton and Pickerill 2004), and economics (Gillman 2002; Pickerill 2009).²

The Supreme Court may promote the interests of elected officials in a variety of ways. It may lend legitimacy to policies, resolve unimportant policy questions, or enforce national policies against outlier states (Dahl 1957; Whittington 2007, cf. Hall and Black 2013). The Court can even promote majority interests by invalidating important federal laws. For example, the Court might “void statutes passed by previous governing coalitions, thus displacing the current legislative baseline” (Whittington 2005, 584) or “protect the ‘in-party’ when it temporarily loses power” (Peretti 2003, 367; see Whittington 2005, 589-91). The Court may also invalidate laws enacted during periods of divided government when the dominant regime is forced to accept unpalatable legislative compromises (Peretti 2003, 367; Lovell 2003; Whittington 2005, 589-591) or laws passed in unusual political circumstances that do not reflect the majority’s persistent interests (Graber

²Other scholars object to characterizing judicial review as either principally countermajoritarian or majoritarian. Bennett (2001) for example, rejects the notion of a static “majority” represented by elected officials that can be thwarted by judicial review (see also Friedman 2009; Lovell 2003). Alternatively, Baum and Devins argue that Supreme Court justices are motivated by a desire for approval from “academics, journalists, and other elites” rather than the preferences of majorities or the rights of minorities (2010, 1516)

1993). The Court can also strike down laws that produce unanticipated consequences (Rogers 2001) or threaten to undermine political bargains that preserve majority coalitions (Landes and Posner 1975). Indeed, legislatures “may effectively delegate a range of tasks to a judicial agent” (Whittington 2005, 584).

Taken together, these studies pose a fundamental challenge to the countermajoritarian difficulty by suggesting it “rests upon a descriptively inaccurate foundation” (Friedman 1993, 580). Political support for judicial review may arise endogenously within legislative majorities as a mechanism to advance that majority’s interests. If so, fifty years of constitutional theory has been misdirected (but see Goldstein and Howe 2011; Pildes 2011). Indeed, this literature suggests that a principal shortcoming of judicial review may be a “majoritarian difficulty” in which “judges are unlikely to stand up for the civil rights of truly marginalized groups” (Dorf 2010, 287; see also Croley 1995).

The Foundations of Judicial Majoritarianism

Judicial review may tend to advance majority interests; however, majoritarian accounts are divided about the political and institutional mechanisms that produce this pattern. The literature suggests two principal foundations for judicial majoritarianism: (1) shared preferences between justices and lawmakers and (2) the justices’ concern for ideological constraint.³ Prior treatments of these mechanisms have focused on the merits stage (when the Court decides the substantive legal issues); however, these factors may also influence decisions at the certiorari, or “cert,” stage (when the Court decides whether to hear a case).⁴

Shared Preferences. First, justices may tend to advance majoritarian interests simply because

³Some scholars also suggest that the Court rationally anticipates the possibility of Congress overriding constitutional decisions through ordinary statute (e.g., Epstein, Knight and Martin 2001; Meernik and Ignagni 1997); however, recent evidence casts serious doubt on this argument (Blackstone 2013; Segal, Westerland and Lindquist 2011; Segal and Spaeth 2002).

⁴Following Epstein, Segal and Victor (2002), the subsequent discussion assumes that justices and lawmakers have symmetric, single-peaked preferences over a common left-right policy dimension and generally make decisions in pursuit of these preferences.

they often share the preferences of lawmakers. Dahl's explanation for this phenomenon is straightforward: the judicial appointment process ensures that "the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States" (1957, 285). Presidents and senators tend to select judges with shared preferences, and judges tend to make decisions in line with their own preferences (Moraski and Shipan 1999; Segal and Spaeth 2002). Accordingly, many scholars agree with Dahl that "[t]he Supreme Court will generally support policies passed by the dominant law-making coalition [due to] the shared values that the appointment process produces" (Segal and Spaeth 2002, 413).

The justices may also tend to share the preferences of elected officials because the justices respond to the same social forces that shape public opinion (Giles, Blackstone and Vining 2008). Because lawmakers also tend to follow public opinion, the Court and the elected branches may frequently find themselves in agreement about the most important policy questions (Casillas, Enns and Wohlfarth 2011; McGuire and Stimson 2004). Consequently, the justices may tend to promote majority interests as they pursue their own policy preferences. If so, we should observe judicial majoritarianism when the justices agree with lawmakers on specific public policies.

Ideological Constraint. The justices may also be motivated by a concern for maintaining the integrity of their institution. The elected branches possess significant capacity to influence the Court's resources and discretion (McGuire 2004; Ura and Wohlfarth 2010), as well as directly sanction the Court or individual justices (e.g., Court-packing or impeachment; Rosenberg 1992). In some situations, elected officials may simply refuse to implement a ruling if the justices act contrary to their interests (Hall 2011). Consequently, the justices may alter their behavior in order to avoid congressional rebukes (Owens, Wedeking and Wohlfarth 2013; Vanberg 2001). Accordingly, "[i]n the context of judicial review, the justices may be particularly sensitive to the preferences of those actors in the coordinate branches..." (Lindquist and Solberg 2007, 74).

A wealth of evidence supports the ideological constraint theory (cf. Sala and Spriggs 2004; Segal 1997). For example, the conservative Rehnquist Court invalidated more federal statutes after Republicans captured Congress in 1994 (Harvey and Friedman 2006), and the Court invalidates

fewer laws when Congress considers more Court-curbing legislation (Clark 2009). In particular, the Court's decisions in judicial review cases may be influenced by congressional preferences (Lindquist and Solberg 2007), and this pattern appears to be driven by the Court's ideological distance from Congress (Segal, Westerland and Lindquist 2011). Congressional preferences may be especially influential when nonimplementation is likely (Hall 2014). Of course, lawmakers are unlikely to attack their ideological allies due to a single countermajoritarian ruling. Accordingly, if the justices are driven by a concern for their institutional power, they should tend to avoid bucking majority preferences when they face unfriendly lawmakers—that is, when the Court is ideologically distant from Congress (Segal, Westerland and Lindquist 2011).

Data and Methods

Our goal is to answer three empirical questions central to constitutional theory and judicial politics: (1) Does the U.S. Supreme Court's exercise of judicial review tend to promote the interests of lawmaking majorities? If so, (2) does this pattern emerge in the cert stage, merits stage, or both, and (3) what mechanisms produce this pattern? To answer these questions, we employ an analytic strategy combining two recent methodological innovations in the study of judicial review. First, following Harvey and Friedman (2006, 2009), we use statutes as our unit of analysis. This strategy overcomes problems of selection bias common to most studies of judicial review. Second, following Segal, Westerland and Lindquist (2011), we utilize congressional roll call votes on the original passage of public laws to estimate support for those laws on the Court and in the sitting Congress. This approach allows us to assess whether the Court's use of judicial review is consistent with congressional preferences and whether the Court's preferences drive that association. Together, these strategies create a powerful analytic framework for identifying whether and how majoritarian pressures influence the Supreme Court's use of judicial review.

A Statute-Centered Approach. Most studies of judicial review focus on cases involving challenges to federal statutes (Hall 2014; Lindquist and Solberg 2007; Sala and Spriggs 2004; Segal, Westerland and Lindquist 2011). Although these studies provide valuable insights into the politics of judicial review; they suffer from selection bias. Because the Supreme Court sets its own agenda,

challenges to federal laws heard by the Court are not a random sample of potential cases. If strategic considerations influence the justices during the agenda-setting process, analyses that overlook case selection may systematically underestimate and misidentify external influence on the Court (see Black and Owens 2009).

The Supreme Court's agenda setting is a particularly important place to look for strategic behavior. Although the Court typically receives more than 8,000 petitions for writs of certiorari each year, the justices usually agree to hear fewer than 100 cases (United States Courts 2012). In order to be heard by the Court, a cert petition must receive votes from four justices, and cert votes are discretionary and secret. Consequently, the Court's cert process is a particularly suitable environment for strategic behavior.

Despite the importance of the cert process and its favorable conditions for strategic behavior, remarkably few studies have examined the influence of lawmakers' preferences on the Court's agenda setting. Epstein, Segal and Victor (2002) find that, when the justices are ideologically distant from Congress, the Court hears a higher proportion of constitutional cases (which Congress cannot override), as opposed to statutory cases (which it can override). However, they examine only those cases the justices decided to hear rather than all statutes that might have been challenged.

Owens examines "542 paid petitions coming out of a federal court of appeals that made the Supreme Court's discuss list during the 1953-93 terms in which the Court was asked to interpret or exercise judicial review over a federal statute" (2010, 419); he finds no evidence of congressional or presidential influence on the Court's agenda. His study has the advantages of modeling individual justice votes and controlling for case-specific variables such as circuit splits and amicus curiae activity. Yet, the study also suffers from potential selection bias because it ignores several factors that may influence whether a case appears on the discuss list in the first place. A case's appearance on the discuss list might be influenced by a litigant's decision to file a case, the behavior of lower courts, the litigants' decisions to appeal lower court rulings, the behavior of law clerks as they recommend cases, and—most importantly—the justices' decisions to place cases on the list. Previous research has shown that litigants anticipate the behavior of district court judges (Taha 2010),

district court judges anticipate the behavior of court of appeals judges (Randazzo 2008), and court of appeals judges anticipate Supreme Court preferences when making decisions (Westerland et al. 2010). Law clerks and individual justices probably also anticipate the Court's future behavior as they make decisions regarding the discuss list. Harvey and Friedman summarize this problem:

If litigants can anticipate which cases the Court is less likely to take because of congressional hostility, then they should be less likely to appeal those cases in the first place. One would then be unlikely to observe the Court's responsiveness to congressional preferences in the sample of cases for which writs of certiorari are requested. Testing a model of congressional constraint on the Court's docket by using a sample of certiorari petitions thus may be an ill-advised strategy (2009, 576).

Harvey and Friedman avoid the problem of selection bias by tracking every federal statute enacted between 1987 and 2001 and examining if and when the Court reviewed (2009) and invalidated (2006) each law. The authors find that the Court is less likely to hear challenges to federal statutes, especially "landmark" statutes, when the Court is ideologically constrained by Congress (Harvey and Friedman 2009). They also find that the justices are less likely to invalidate federal statutes when they are constrained by Congress (Harvey and Friedman 2006). This statute-centered (rather than case-centered) approach offers a solution to the selection bias problem.

Unfortunately, by examining every federal statute, Harvey and Friedman encounter some notable difficulties. First, in an effort to manage the scope of the data, the authors limit their study to a relatively brief time period. Second, because they examine so many statutes (many of which have only minor policy implications), patterns in the exercise of judicial review are easily obscured amid the volume of legislative activity. For example, Harvey and Friedman find that when the Court is unconstrained, the probability of invalidating a federal statute increases from 0.00036 to 0.00137.

We adopt a modified version of Harvey and Friedman's (2006; 2009) statute-centered approach. This method overcomes problems of selection bias and enables us to distinguish between majoritarian patterns at the cert and merits stages. Of course, the justices cannot choose to review any law in any year; they must choose from challenges presented in cert petitions. Nonetheless, if the

justices desire to invalidate a statute, it is likely that some potential litigant will anticipate this desire and file a petition. In fact, the justices can signal their desires in other opinions, such as Justice Thomas's concurrence in *Printz v. United States* (1997). Therefore, our analysis proceeds on the assumption that the Court will have access to appropriate cases should it prefer to rule on a law.

This approach is not without shortcomings. In particular, it does not consider the many political, legal, and strategic considerations which shape the decisions of (potential) litigants to challenge the constitutionality of federal laws, of lower court judges to decide cases in ways that make cert more or less likely, or of losing parties to petition the Supreme Court for cert. We are conscious of these limitations, and we recognize that the Court's decision to grant cert represents the culmination of numerous complex strategic interactions that unfold in a variety of institutional settings over time. However, by focusing on statutes rather than cases and modeling the result of that process, reflected in the Court's decisions to grant cert, we are able to more precisely identify the nature and degree of judicial majoritarianism. We likewise identify a framework through which future research may investigate the influence of decisions which precede the certiorari process on the ultimate fate of federal legislation. Thus, despite these limitations, our work makes important substantive and methodological contributions to understanding the nature of judicial review.

We also aim to improve Harvey and Friedman's analysis by examining a longer time period and focusing on Congress's most important legislative enactments. Our attention to important laws offers four advantages. First, it aligns with Dahl's emphasis on "legislation that could reasonably be regarded as important *from the point of view of the lawmaking majority*" (1957, 287; emphasis in original). Second, it allows us to disregard the bulk of federal statutes that are not significant enough to warrant the Court's attention and concentrate on laws that are of most interest to elected officials, scholars, and the public. Third, because these laws are invalidated at a relatively high rate, we are able to examine greater variation with fewer observations. Finally, the Court may sometimes make "decisions that are deemed unworthy of legislative attention...that other political actors would be willing, even eager, to support"; accordingly, the invalidation of unimportant statutes may promote a "division of labor" between Congress and the Court, freeing elected officials to handle

issues that win them “political plaudits” (Whittington 2007, 121-124). We avoid this complication by focusing our analysis on the Court’s treatment of important federal statutes.

We therefore compile a data set of every important public law enacted from 1949 to 2008.⁵ These data include every public law identified as “important” by David Mayhew’s “Sweep 1” process (2005). Mayhew codes “important” laws as those that were mentioned in the end-of-session wrap-up stories in the *New York Times* and the *Washington Post*. We then identify which of these statutes were subject to a constitutional challenge before the Supreme Court and which of those challenged were invalidated. This procedure identifies 260 important public laws that were challenged 122 times and invalidated 51 times.⁶

Operationalizing Majority Support. Our goal is to evaluate whether judicial review promotes majority interests and, if so, when and why. A critical step in this analysis is to clarify exactly who constitutes the “majority.” Because we aim to inform the enduring debate over the nature of judicial review, we adopt Dahl’s conception of a “lawmaking majority” as “a majority of those voting in the House and Senate, together with the president” (1957, 284). This understanding of the majority is similar to Bickel’s notion of “the representatives of the actual people of the here and now” (1986, 17). Whereas Dahl argued that the Court was unlikely to block a “determined and persistent lawmaking majority on a major policy” (1957, 286), Bickel believed the invalidation of federal laws inherently “thwarts the will” of these lawmakers (1986, 17). Accordingly, the critical

⁵We have explored the possibility that interbranch relations vary over time as the New Deal Court transitions to a more conservative Court. There is some evidence that majoritarian pressures are relatively weak in the transitional period and relatively strong when the Court has a clearer political identity. This finding may suggest a route for future research.

⁶Mayhew’s Sweep 1 identifies 295 laws; however, 35 of these laws were enacted by voice votes which makes it impossible to measure support for the law by current officials. Accordingly, our analysis excludes these 35 laws, which were challenged seven times and invalidated twice. In comparison, Harvey and Friedman (2006, 2009) examine more than 3,700 public laws, 42 of which were reviewed by the Court and 22 of which were invalidated.

empirical debate between Dahl and Bickel is whether the Court tends to invalidate “important” statutes that are supported by those who collectively hold the lawmaking power (Dahl 1957, 287).

Although Dahl mentioned only the president and congressional majorities, the legislative process obviously includes additional complexities. To account for these complexities, we employ Krehbiel’s (1998) theory of pivotal politics. In pivot models, the passage of legislation depends on support from several actors. The pivotal actor is the actor least likely to support the legislation whose support (combined with the support of all actors with higher likelihood of support) would guarantee passage of the legislation. In a single-chamber legislature operating in a unidimensional policy space with majority voting and no agenda control, the pivotal actor is the median member of the chamber. Institutional structures that create additional veto points add more pivots. For example, bicameralism, the presidential veto, the filibuster, and political parties all complicate the model. Yet, the basic intuition is straightforward: the enactment of legislation is controlled by the actor least likely to support the legislation whose support would guarantee passage.

Evaluating judicial majoritarianism does not require specification of a particular pivot model. We therefore test three possible formulations: (1) a Floor Median Model, in which potential pivotal actors include the House and Senate chamber medians, the president, and the veto-override players; (2) a Senate Filibuster Model, which adds filibuster players as potentially pivotal actors, and (3) a Party Gatekeeping Model, which adds the median member of the majority party in both chambers. The critical theoretical question for this analysis is not which model accurately describes the legislative process, but rather which model reflects a normatively relevant conception of a “lawmaking majority.” However, as the results below indicate, our substantive inferences do not rely on a particular form of the pivot model.

We employ the methodology developed by Segal, Westerland and Lindquist (2011) and use Poole’s (1997) Common Space scores to estimate current support for public laws among various critical officials. The first step in this process is to run logistic regressions on the original roll-call votes using the then-Member of Congress’s Common Space score to predict yea votes. Next, we use the coefficients from these equations along with each current official’s Common Space score to

estimate the predicted probability of the official supporting the law at the time of potential review. Using this process, we are able to estimate the predicted probability of the pivotal actor in the legislative process supporting the law. We refer to the resulting estimates as *majority support*. We employ this measure in all three pivot models to test the empirical debate between Bickel and Dahl; i.e., does the Court tend to invalidate important statutes with majority support?

Operationalizing Shared Preferences. Next, in order to evaluate whether judicial majoritarianism is motivated by shared preferences between justices and lawmakers, we utilize the same procedure described above to estimate the justices' support for individual public laws. We use Judicial Common Space scores (Epstein, Knight and Martin 2007) and the original roll call data to estimate the predicted probability of the median justice on the Court supporting the law.⁷ We then measure the absolute difference between majority support and Court support. We subtract that value from 1 to estimate *shared preferences* between the median justice and pivotal lawmaker. Higher values of shared preferences indicate that the lawmaking majority and the Court have similar preferences with regard to a specific public law (either shared support or shared opposition). We use this measure to test Dahl's theory that judicial majoritarianism is driven by shared preferences between justices and lawmakers. If Dahl was correct, shared preferences should moderate the effect of majority support on judicial review: the association between majority support and judicial review should be strongest when the shared preferences variable is high.

Operationalizing Ideological Constraint. Finally, the ideological constraint theory suggests that judicial majoritarianism is driven by ideological divergence between the Court and Congress.⁸

⁷We assume the median justice is the pivotal actor at both the merits and cert stages. Although only four justices must agree to grant cert, Lax (2003) demonstrates that the primary effect of the Rule of Four is to lower the threshold for the magnitude of utility gains that must be realized by the median justice before the Court grants cert. Accordingly, even under the Rule of Four, the probability of the Court hearing a challenge should be influenced by the median justice's preferences.

⁸Our results are also robust to controlling for the ideological distance between the median justice and the president; however, we find no effect of presidential constraint.

To measure ideological divergence, we employ Bailey and Maltzman (2011) ideal point estimates for the median justice and the median members of the House and Senate.⁹ When the median justice’s ideal point falls between that of the median House and Senate members, the Court is unconstrained, so we code *ideological constraint* as 0. If the median justice falls outside of this interval, we code ideological constraint as the absolute difference between the Court and the nearer chamber median (see Segal, Westerland and Lindquist 2011). If ideological divergence drives judicial majoritarianism, then ideological constraint should moderate the effect of majority support on judicial review: the association between majority support and judicial review should be strongest when the ideological constraint variable is high.

Analysis

We conduct three analyses to address our empirical questions. We begin by providing a description of our modeling strategy and a preview of our findings. We then present our analyses of (1) whether judicial review is majoritarian, (2) whether a majoritarian pattern emerges at the cert stage, the merit stage, or both, and (3) which mechanisms drive judicial majoritarianism.

First, we conduct a duration analysis to test the relationship between lawmakers’ support for important public laws and the invalidation of those laws by the Supreme Court. The dependent variable in this model is the invalidation (or partial invalidation) of the statute by the Court; that is, in any given year a law might be struck down (“fail”) or not (“survive”). The key independent variable is the predicted support of a pivotal voter in Congress (majority support), which we estimate using the three pivotal voter models described above. Also, because duration data is equivalent to binary time-series–cross-sectional data, we follow the advice of Carter and Sigorino (2010) and analyze the data using a logistic regression with cubic polynomial time variables to account for potential duration dependence.¹⁰ Our time variable is the number of years since a statute’s en-

⁹Bailey and Maltzman (2011) scores use bridging actors and observations, and, therefore, may provide more reliable estimates of relative ideological positions across institutions. Our results are also robust to measuring ideological divergence with Judicial Common Space scores.

¹⁰A likelihood ratio test of the Floor Median Model in Table 1 versus a specification without

actment or last invalidation (*years without invalidation*). This approach is functionally equivalent to a traditional duration analysis and offers clearer interpretation.¹¹ We find that majority support is negatively associated with the invalidation of important laws: as the predicted probability of majority support increases, the probability of the Court invalidating the law decreases. This result indicates that the Court tends to promote majority interests.

Second, we evaluate when in the Supreme Court's decision making process this majoritarian pattern emerges. To do so, we utilize a two-stage Heckman probit model. The selection variable in the first stage of the model is the Court's decision to hear a challenge to an important public law. The dependent variable in the second stage is the Court's decision to invalidate (or partially invalidate) the statute. We include cubic polynomials of years without invalidation in the first stage to account for duration dependence. We include majority support in both stages to test when the Court's decisions tend to promote majority interests. We find that the majoritarian pattern is driven by the Court's decisions at the cert stage. Predicted support for a law in Congress is negatively associated with the Court hearing a challenge to it: the greater the support by lawmakers, the less likely the Court is to hear a challenge to that law in the first place.

Finally, we evaluate competing explanations for the majoritarian pattern that emerges in the cert stage. In particular, we model the effect of shared preferences and ideological constraint in shaping majoritarian judicial review. To do so, we employ a logistic regression of the Court's decision to hear a challenge to an important public law. We include majority support, shared preferences, ideological constraint, and cubic polynomials of years without invalidation as predictors. We also interact majority support with both shared preferences and ideological constraint in order to identify whether these mechanisms moderate the relationship between majority support and judicial review. We find the Court only promotes majority interests when it is ideologically distant the cubic polynomials yields a χ^2 statistic of 43.05; therefore, we can reject the null hypothesis of duration independence, indicating that the cubic polynomials should be included in the model.

¹¹A Cox Proportional Hazard Model, logit model with temporal dummies, and logit model with cubic splines (Beck, Katz and Tucker 1998) all yield substantively indistinguishable results.

Table 1: Testing Judicial Majoritarianism

	Floor Median Model	Senate Filibuster Model	Party Gatekeeping Model
Majority Support	-1.50* (0.51)	-1.14* (0.50)	-1.32* (0.49)
Years without Invalidation	-0.19* (0.09)	-0.17* (0.09)	-0.17* (0.09)
Years without Invalidation ²	0.01 (0.01)	0.01 (0.01)	0.01 (0.01)
Years without Invalidation ³	-0.00 (0.00)	-0.00 (0.00)	-0.00 (0.00)
Constant	-2.59* (0.51)	-2.97* (0.45)	-2.88* (0.43)
N	7475	7475	7475
Log-pseudolikelihood	-272.52	-273.74	-272.76
Wald χ^2	31.47	32.19	32.45
Prob $>\chi^2$	0.00	0.00	0.00

Note: Table reports logistic regression models of the U.S. Supreme Court invalidating important federal statutes with three different versions of majority support. Robust standard errors in parentheses. * $p < 0.05$; two-tailed test.

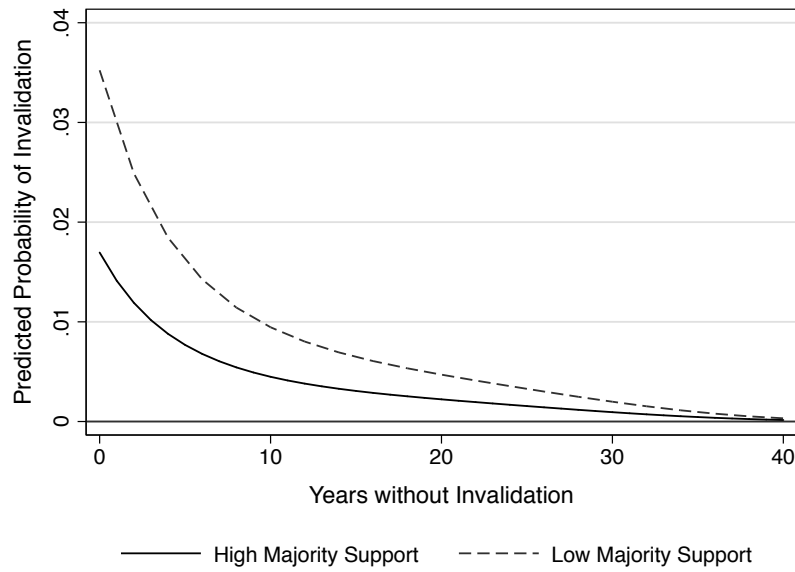
from Congress, regardless of its own shared preferences with lawmakers.

Judicial Majoritarianism. Table 1 reports the results of the first analysis, which assesses the relationship between lawmaker preferences and the invalidation of important federal laws. The table reports three models estimated under different assumptions about the legislative process (the Floor Median Model, the Senate Filibuster Model, and the Party Gatekeeping Model). All three models indicate that greater support for an important law by the current pivotal legislator is strongly associated with a decreased probability of the Court invalidating the law.

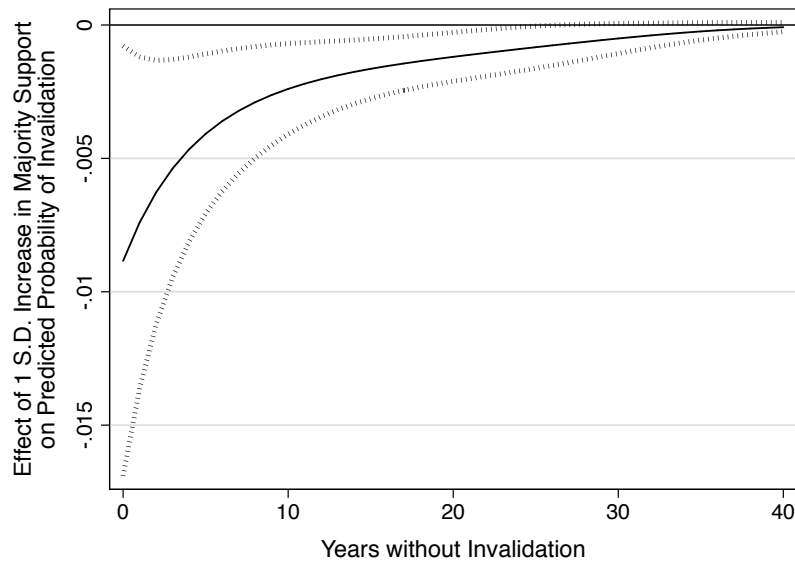
Figure 1 illustrates the association between majority support and the invalidation of important public laws based on the Floor Median Model in Table 1. Figure 1(a) reports the predicted probability of a law being invalidated plotted against the number of years since the law was enacted or last invalidated. The figure compares the predicted probability of invalidation for laws with high

Figure 1: Judicial Majoritarianism Over Time

(a) Predicted Probability of Invalidation



(b) Marginal Effects of Majority Support



Note: Figure 1(a) presents the predicted probability of the Supreme Court invalidating an important public law as the time since enactment or previous invalidation increases when majority support is one standard deviation above and below the mean. Figure 1(b) presents the conditional marginal effects of a one standard deviation increase in majority support on the probability of the Supreme Court invalidating an important public law as the time since enactment or previous invalidation increases. Dotted lines indicate 95% confidence intervals. Predicted probabilities and marginal effects are based on the Floor Median Model in Table 1 with majority support set to the mean.

majority support (one standard deviation above the mean) and laws with low majority support (one standard deviation below the mean). As shown in the figure, the probability of invalidation declines sharply over time. More importantly, support from sitting elected officials is strongly associated with the invalidation of important public laws: the probability of a law with high majority support being struck down the year after its enactment is approximately .017; however, the probability of invalidation for a law with low majority support more than doubles to .035.

Figure 1(b) reports the conditional marginal effect of a one standard deviation increase in majority support on the predicted probability of invalidation across time. As illustrated in the figure, the association between majority support and the invalidation of important laws is statistically significant in the first quarter century after a law is enacted or last invalidated. The effect is strongest the year after enactment or invalidation, when a standard increase in majority support is associated with a one percentage point decline in the probability of invalidation. Considering that the average predicted probability of invalidation is about two-thirds of one percent, this effect is substantial.

These results support Dahl's thesis: the Court tends to promote the interests of the lawmaking majority by invalidating statutes that enjoy less support among current elected officials. It is important not to overstate this finding. The Court sometimes invalidates laws with substantial congressional support; in other words, judicial review is occasionally countermajoritarian. Nonetheless, the Supreme Court's invalidation of important federal laws is principally majoritarian.

Judicial Majoritarianism at the Cert and Merits Stages. The first analysis demonstrates that the Court is less likely to invalidate laws that enjoy greater support from current lawmakers; however, it remains to be seen when in the Court's decision making process this pattern emerges. We therefore assess the relationship between lawmaker preferences and the Court's decisions at both the cert and merits stages. Table 2 presents the results of our two-stage Heckman probit analysis.

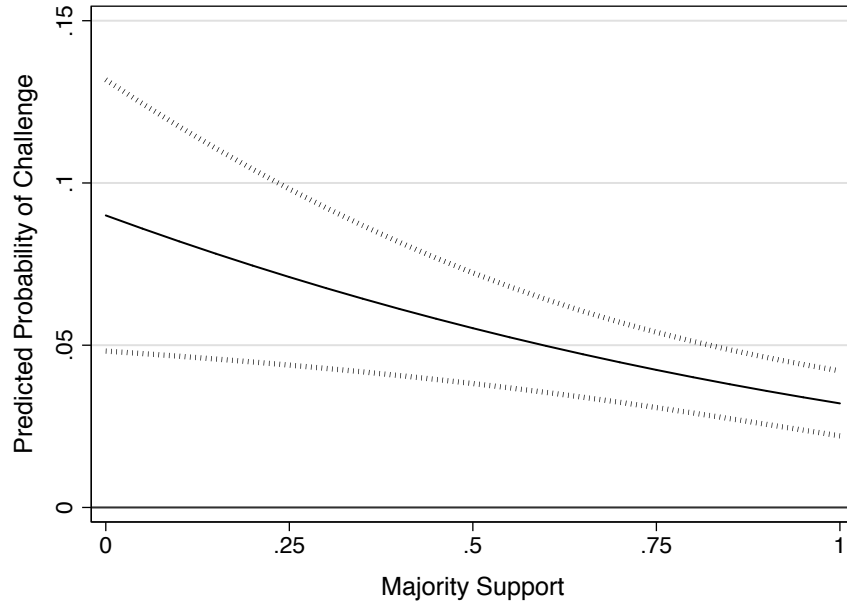
The data indicate that judicial majoritarianism is driven by the Court's decisions at the agenda setting stage. The Court is significantly less likely to hear challenges to important laws that enjoy greater support from current lawmakers; however, after the Court agrees to hear a challenge, there is no majoritarian effect on the decision to invalidate the law. Majority support is not significantly

Table 2: Judicial Majoritarianism at the Cert and Merits Stages

	Floor Median Model	Senate Filibuster Model	Party Gatekeeping Model
<i>Stage 1: Challenges to Important Federal Statutes</i>			
Majority Support	−0.51* (0.14)	−0.42* (0.14)	−0.46* (0.13)
Years without Invalidation	−0.07* (0.02)	−0.07* (0.02)	−0.07* (0.02)
Years without Invalidation ²	0.00 (0.00)	0.00 (0.00)	0.00 (0.00)
Years without Invalidation ³	−0.00 (0.00)	−0.00 (0.00)	−0.00 (0.00)
Constant	−1.27* (0.14)	−1.38* (0.13)	−1.36* (0.12)
<i>Stage 2: Invalidations of Important Federal Statutes</i>			
Majority Support	−0.01 (0.53)	0.08 (0.51)	0.03 (0.49)
Constant	0.81 (0.88)	0.77 (0.92)	0.78 (0.90)
N	7475	7475	7475
Log-pseudolikelihood	−628.30	−629.81	−628.44
Wald χ^2	0.00	0.03	0.00
Prob $>\chi^2$	0.98	0.87	0.96

Note: Table reports two-stage Heckman probit models of the U.S. Supreme Court deciding to hear challenges to important federal statutes and subsequently invalidating those statutes with three different versions of majority support. Robust standard errors in parentheses. * $p < 0.05$; two-tailed test.

Figure 2: Majoritarian Agenda Setting



Note: Figure presents the predicted probability of the Supreme Court hearing a challenge to an important public law the year after its enactment or previous invalidation as majority support increases from one standard deviation below the mean to one standard deviation above the mean. Dotted lines indicate 95% confidence intervals. Predicted probabilities are based on the Floor Median Model in Table 2.

associated with the Court's decisions at the merits stage in any of the models.

Figure 2 illustrates the magnitude of the association between majority support and Supreme Court agenda setting. The x-axis indicates majority support based on the Floor Median Model. The y-axis reports the predicted probability of the Court granting cert in a case challenging the constitutionality of an important public law the year after its enactment or previous invalidation. As shown in the figure, the predicted probability of the Court hearing a challenge drops from .09 to .03 as majority support increases from its minimum to its maximum.

The Foundations of Judicial Majoritarianism. We have established that the Supreme Court is less likely to invalidate important public laws with greater majority support and this pattern arises because the Court is less likely to hear cases challenging such laws. Next, we evaluate which factors drive this majoritarian pattern in the Court's agenda setting, testing two mechanisms that might encourage judicial majoritarianism: shared preferences between justices and lawmakers

and the justices' concern for ideological constraint. To do so, we run a logistic regression of the Court hearing a challenge to an important public law on the time variables and a three-way interaction between majority support, shared preferences, and ideological constraint.¹² If judicial majoritarianism is driven by shared preferences or ideological constraint, we expect the effect of majority support to be moderated by these variables.

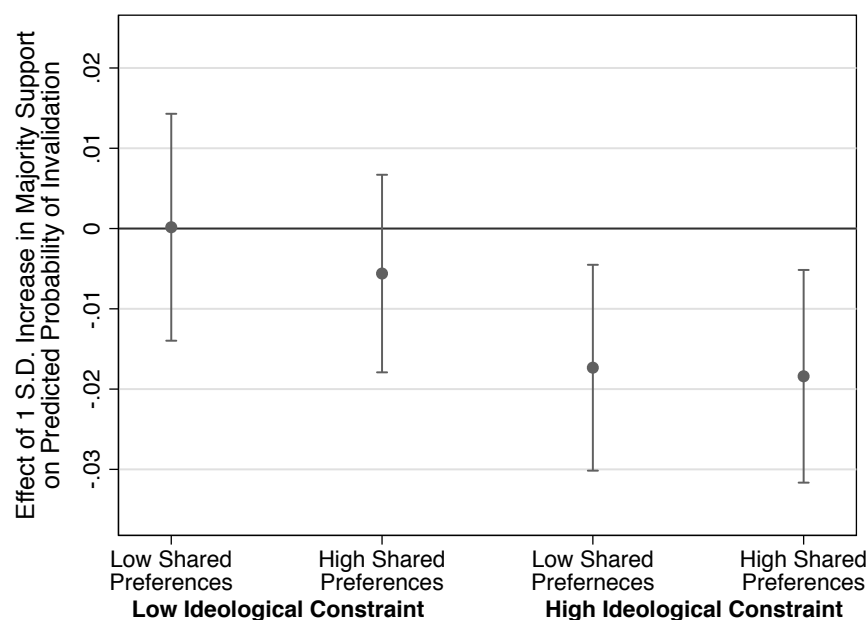
The results of a three-way interaction are difficult to interpret, often conveying little information about the magnitude of the relationships of interest (Brambor, Clark and Golder 2006, 74). Accordingly, we present predicted probabilities and marginal effects in order to illuminate the interactions between majority support, shared preferences, and ideological constraint.¹³

Figure 3 illustrates the conditional marginal effect of a one standard deviation increase in majority support on the probability of the Supreme Court hearing a challenge to an important public law with 95% confidence intervals. Marginal effects are calculated at different levels of shared preferences and ideological constraint for the year after a law's enactment or previous invalidation. "High" and "Low" shared preferences and ideological constraint indicate values one standard deviation above and below the mean, respectively. When ideological constraint is high, greater majority support is strongly associated with the Court hearing fewer challenges; however, when constraint is low, majority support is not significantly associated with the Court hearing a challenge. Furthermore, the difference between these marginal effects is statistically significant ($p = .03$, one-tailed test). These findings indicate that the Court only tends to promote majority interests when it is ideologically distant from Congress. In contrast, the marginal effect of majority support is statistically indistinguishable for high and low levels of shared preferences ($p = .33$, one-tailed test). Accordingly, we find no evidence that judicial majoritarianism is driven by shared preferences between lawmakers and justices with regard to specific public laws.

¹²The shared preferences and ideological constraint variables are weakly correlated ($r = .07$).

¹³Marginal effects in Figure 3 and predicted probabilities in Figure 4 are based on the Floor Median Model. Marginal effects and predicted probabilities based on the Senate Filibuster and Party Gatekeeping Models are substantively indistinguishable.

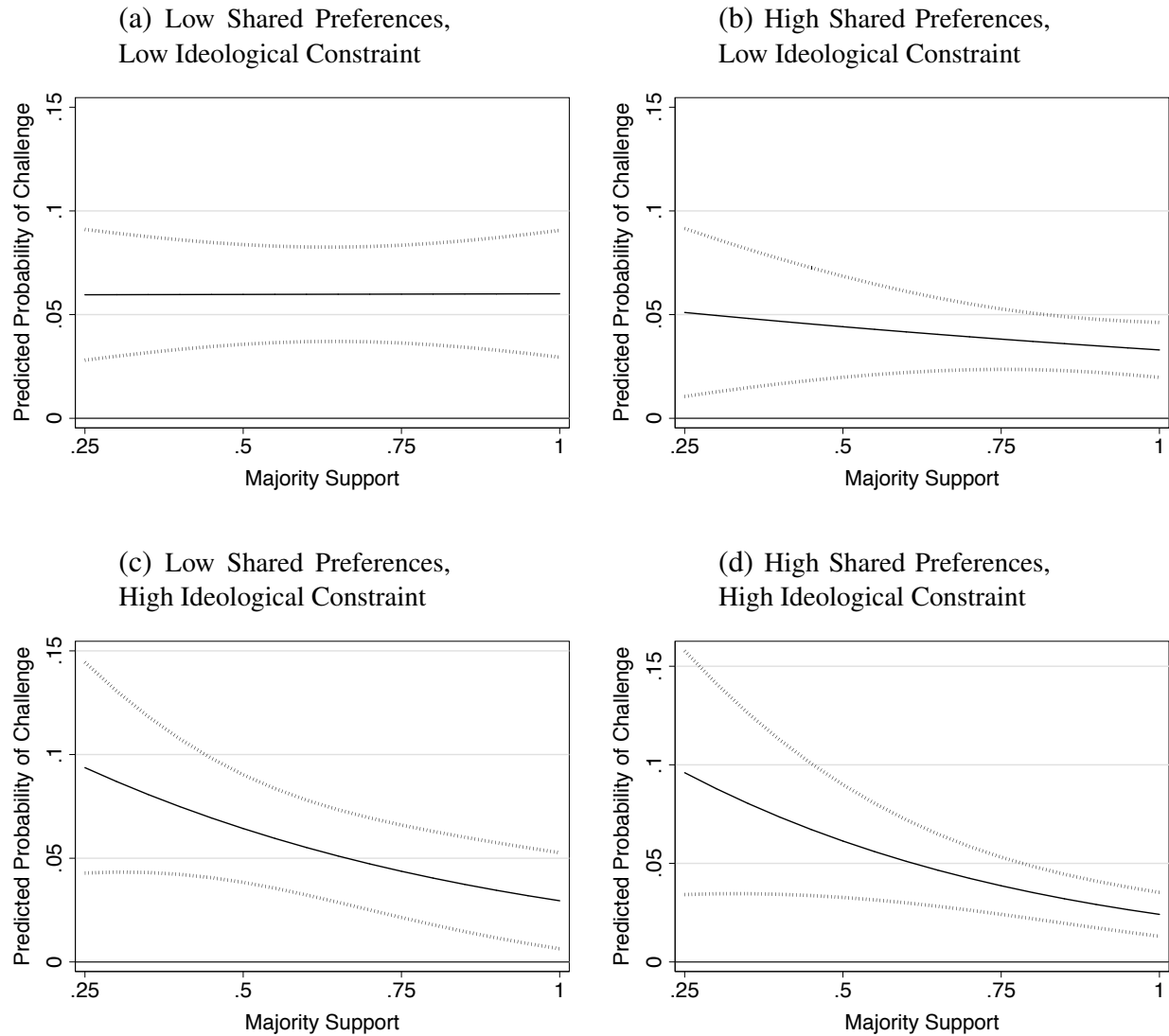
Figure 3: Marginal Effects of Majority Support by Shared Preferences and Ideological Constraint



Note: Figure presents the conditional marginal effects of a one standard deviation increase in majority support on the probability of the Supreme Court hearing a challenge to an important public law the year after its enactment or previous invalidation with 95% confidence intervals. Marginal effects are based on the Floor Median Model.

Figure 4 reports the predicted probability of the Court hearing a challenge to an important public law as majority support increases from its minimum to its maximum with 95% confidence intervals. Predicted probabilities are calculated at varying levels of shared preferences and ideological constraint for the year after a law's enactment or previous invalidation. Under low constraint, the predicted probability of the Court hearing a challenge to an important law remains relatively low across different levels of majority support, regardless of shared preferences. Under high constraint, the predicted probability of the Court hearing a challenge is relatively high when majority support is low, and it declines as majority support increases. Once again, shared preferences are not associated with the majoritarian effect. Therefore, the data suggest that ideological constraint drives judicial majoritarianism: greater majority support for an important federal statute reduces the law's prospects of being challenged only when the Court is ideologically distant from Congress.

Figure 4: The Foundations of Majoritarian Agenda Setting



Note: Figures present the predicted probability of the Supreme Court hearing a challenge to an important public law the year after its enactment or previous invalidation as majority support increases from two standard deviations below the mean to the maximum. Dotted lines indicate 95% confidence intervals. Predicted probabilities are based on the Floor Median Model.

Summary and Conclusions

We began by revisiting the classic tension between democratic values and the institution of judicial review in American politics. Many contemporary constitutional theorists and political scientists express grave concern about the countermajoritarian difficulty that arises when “the Supreme Court declares unconstitutional a legislative act” and thereby “thwarts the will of the representatives of the actual people of the here and now” (Bickel 1986, 17). Yet, others argue the Supreme Court is part of a national governing “alliance” and its power of judicial review is principally exercised in service of majority interests (Dahl 1957, 293). An enormous body of normative, positive, and empirical scholarship engages these contrasting views. Here, we combine recent methodological advances in the study of judicial review to adjudicate between these contrasting views and provide new insights into this critical puzzle in the study of American constitutionalism.

Our analysis proceeds from three questions: (1) Is the Supreme Court’s exercise of judicial review best characterized as majoritarian or countermajoritarian? If judicial review is typically majoritarian, (2) when in the Court’s decision making process does this pattern emerge, and (3) which political and institutional mechanisms drive judicial majoritarianism? To answer these questions, we examine the Court’s treatment of every important federal statute enacted from 1949 to 2008 at both the certiorari and merits stages. Though this approach is not without limitations, our results provide strong evidence to resolve the empirical dispute between Bickel and Dahl.

The data provide a clear answer to our first question: the U.S. Supreme Court tends to exercise judicial review consistently with the preferences of lawmaking majorities. To be sure, we observe instances of the Court invalidating laws that enjoy the support of contemporary majorities. Yet, important laws that are opposed by pivotal lawmakers are more likely to be invalidated than laws that continue to enjoy support from these lawmakers. We therefore reject Bickel’s (1986) central premise that judicial review is *necessarily* a countermajoritarian institution. We also reject the weaker claim that judicial review as it is practiced by the U.S. Supreme Court is principally countermajoritarian. Instead, we find convincing evidence that majoritarianism generally animates judicial review in the United States.

This first result suggests that the emphasis on the countermajoritarian difficulty as a problem in modern constitutional theory and as a starting point for studies of judicial behavior is misplaced. Judicial countermajoritarianism exists, and it remains normatively problematic. Yet, scholars have spent comparatively little time investigating other aspects of the interaction between judicial power and democratic politics, creating a startlingly incomplete picture of whether judicial review is “worth it” (Friedman 2002, 257). Our findings therefore emphasize the importance of continued efforts to evaluate the social value of judicial review and, in particular, to take up research that considers various “majoritarian difficult[ies]” that may arise from judicial review principally exercised in service of majority interests (Dorf 2010).

Our two-stage analysis of the Supreme Court’s decisions at the cert and merits stages answers our second question. The data show that the Court’s tendency to promote majority interests is concentrated in the agenda setting stage. The greater the support a law enjoys among current lawmakers, the less likely the Court is to hear a challenge to the law and, as a result, the more likely the law is to “survive.” This result provides a new and important insight into the relationship between the Supreme Court and Congress. Judicial majoritarianism emerges because the Court is unlikely to hear challenges to federal statutes that enjoy majority support among lawmakers.

Moreover, this second result also indicates that the certiorari process presents a particularly fruitful opportunity for gaining new insights into judicial decision making and the strategic behavior of those who interact with constitutional courts. Although we style our work as an analysis of the Supreme Court’s certiorari decisions, we are deeply conscious that decisions to hear challenges to laws or to avoid these cases is merely the final step in a lengthy process that unfolds, in part, as a response to other actors’ strategic expectations about the Court’s propensity to hear particular cases and rule in particular ways. It is highly likely that patterns in judicial behavior during the certiorari process, including those we identify, emerge as the result of interactions among the Supreme Court, lower courts, and (potential) litigants. The prospect of strategic litigant behavior is especially important in light of research that fails to find evidence of external influence on the justices’ cert votes (Owens 2010). Identifying which choices made by lower courts and litigants

lead the Court to avoid confrontations with Congress is beyond the scope of the present analysis; however, our findings suggest important avenues for future research.

Our work also highlights the importance of understanding judicial review of state laws, especially state laws tied to national policy debates such as racial equality, abortion, and the death penalty. Here, we have considered only the Court's treatment of important federal laws as way to adjudicate the competing claims of Dahl and Bickel about the nature of Supreme Court power and its relationship to federal lawmaking majorities. Investigating the Court's treatment of state laws is an important next step in this field (see, e.g., Hall and Black 2013; Kastellec 2014).

Finally, the data also provide new insights into the political foundations of majoritarian judicial review. In particular, we find that the justices' concern for ideological constraint is a critical factor in shaping the Court's response to support for an important federal law in the sitting Congress: congressional preferences about specific laws influence the Supreme Court's agenda when the Court is ideologically distant from the sitting Congress. In other words, the political threat posed by an unfriendly Congress, rather than justices' shared preferences with lawmakers, animates majoritarianism on the Supreme Court. This result confirms previous research that has identified the role of ideological constraint in motivating judicial behavior (Hall 2014; Segal, Westerland and Lindquist 2011). However, our findings extend and illuminate prior studies by identifying the influence of ideological constraint at the certiorari stage and linking this influence to judicial majoritarianism.

This last result also supports the argument that elected officials maintain the practice of judicial review because the federal courts tend to serve as "arenas for extending, legitimizing, harmonizing, or protecting the policy agenda of political elites or groups within the dominant governing coalition" (Clayton and Pickerill 2006, 1,391; see Dahl 1957; Fox and Stephenson 2011; Graber 1993; Landes and Posner 1975; Rogers 2001; Taylor-Robinson and Ura 2013; Whittington 2005). These theoretical and historical accounts emphasize gains to elected officials that accrue from judicial review exercised on behalf of majoritarian interests. Our findings indicate that the practice of judicial review in the United States is broadly consistent with this majoritarian perspective.

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